IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

GARY HERBERT VOLLICK,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

No. 22,306

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

## BRIEF FOR APPELLEE

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## BRIEF FOR APPELLEE

## I.
## JURISDICTION

Appellant was indicted on June 14, 1967, for a violation of the Dyer Act, 18 U.S.C. §2312, and for impersonation of a federal officer, 18 U.S.C. §912. Record on Appeal, hereinafter "RC," Item 1. On motion of the United States, Count II, the impersonation count, was dismissed on July 28.

Appellant was tried by jury and found guilty on July 28. RC, Item 4. On August 7 defendant's post-trial motions were denied and he was adjudged guilty and sentenced. RC, Items

5, 6. Notice of appeal was filed on August 17, 1967. The trial court had jurisdiction under 18 U.S.C. §3231, and this court has jurisdiction by virtue of 28 U.S.C. §1291 and 28 U.S.C. §1294.

## II.

## STATEMENT OF FACTS

On June 2, 1967, one Norris Pennington met Vollick at the request of a mutual friend in order to help Vollick get settled in El Paso. Transcript of Trial, hereinafter "TR," p. 18. They accordingly went to Budget Rent-A-Car in El Paso on June 2, where Vollick applied to rent a car for a couple of days. TR 20. When asked his employment, Vollick falsely stated that he was a clerk at the Federal Correctional Institute at La Tuna. TR 20; TR 46; Government Exhibit 3. Pennington then signed an agreement renting a 1967 Plymouth Barracuda bearing license plate CPL-103. TR 19; Government Exhibit 1. Vollick was present when Pennington signed the agreement, TR 19, which called for return of the car by June 5, and Vollick was designated as an additional driver. Government Exhibit 1, RC 3. Pennington turned the car over to Vollick for use in El Paso so that Vollick could contact his prospective employer, get an apartment and some food, TR 21, 25, and be ready to go to work the next Monday morning, TR 27. Vollick told Pennington that he would have the car back by 6:00 p.m., Sunday, June 4. TR 22. Nothing was said about Vollick taking the car into New Mexico or Arizona. TR 21-22.

By 11:00 p.m. on June 2, Vollick had travelled to Safford, Arizona, where he was seen in the cocktail lounge of the Buena Vista Hotel. TR 48. Four days later, on June 6, 1967, Vollick was stopped for a minor traffic violation while driving the car west on U.S. Highway 70, approximately

eleven miles west of Pima, Arizona, TR 34, 36. When questioned by Highway Patrolman Matthews, Vollick claimed that he was the registered owner of the car and that his address was La Tuna, Texas. TR 36.

On or about June 6, at Ranch Trailer Sales in Chandler, Arizona, Vollick and a woman picked out a house trailer which they stated they intended to buy. TR 39. Vollick personally filled out a credit application for the trailer indicating that he was the owner of a 1967 Plymouth Barracuda. TR 41; Government Exhibit 2.

On June 8 Vollick was arrested while in possession of the car in Safford, Arizona, TR 49, and lessor's records contain no indication that Vollick had attempted to get an extension of the date on which the car was due back. TR 16-17; Govetnment Exhibit 1.

## III.

## OPPOSITION TO SPECIFICATION OF ERROR

1. The trial court properly denied the defendant's motion for judgment of acquittal because the Government's evidence was sufficient to take to the jury the question of whether the appellant formed an intent to steal the car.

2. The trial court properly denied the defendant's post-trial motions because the evidence supported the verdict.

3. The trial court did not err in giving its instructions on what constitutes "stealing" under the Dyer Act.

## IV.

## SUMMARY OF ARGUMENT

1. The evidence was sufficient to take the case to the

jury and for it to find that the appellant intended to steal the car and thereafter transported it in interstate commerce.

2. The trial court appropriately instructed the jury that a defendant need not, in order to "steal," intend permanently to deprive an owner of his vehicle, but, rather, that it is sufficient if the defendant did not intend to return the automobile, but instead intended to use it for his own purposes so long as it served his convenience and thereafter to dispose of it or abandon it.

## V.

## ARGUMENT

### 1. The evidence was sufficient to take the case to the jury and for it to find that the appellant intended to steal the car and thereafter transported it in interstate commerce.

The first two specifications of error essentially attack the sufficiency of the evidence. Appellee contends that the evidence was sufficient.

The word "stolen" as used in the Dyer Act "includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership." *United States v. Turley*, 352 U.S. 407, 417 (1957). The offense can be committed even though acquisition is lawful if the intent to deprive the benefits of ownership is thereafter formed and the car is then transported in interstate commerce. E.G., *Gerber v. United States*, 287 F.2d 523 (10th Cir. 1961). It is settled that a "taking" under the Dyer Act can occur though possession is acquired by means of a rental agreement, e.g., *Berard v. United States*, 309 F.2d 260 (9th Cir. 1962), and that a defendant's intention, at the time he rented the automobile and when he first transsported it in interstate commerce, can

be shown by his subsequent conduct. *United States v. Dillinger,* 341 F.2d 696, 698 (4th Cir. 1965).

Courts have given weight to facts and circumstances similar to those of our case in affirming Dyer Act convictions. Thus, *United States v. Weir,* 348 F.2d 453, 454 (4th Cir. 1965), and *United States v. Dillinger,* supra, rely in part on false representations regarding employment at the time of leasing. Similarly the extensive distance travelled from the place of acquisition was a factor in *Smith v. United States,* 233 F.2d 744, 747 (9th Cir. 1956), and in *Breece v. United States,* 218 F.2d 819 (6th Cir. 1954). *United States v. Diodati,* 355 F.2d 806 (4th Cir. 1966), noted that there was no indication in the lessor's records that the lessee had communicated with the lessor regarding an extension of the return date. And *Turner v. United States,* 248 F.2d 948 (5th Cir. 1957), was based partially upon a false representation to a highway patrolman regarding ownership.

Appellee accordingly contends that Vollick's conduct made the case one for the jury. At the time of renting he falsely stated that he was a clerk at La Tuna; he almost immediately thereafter drove across New Mexico and into Arizona contrary to the understanding that he was to use the car in El Paso; he apparently failed to contact the lessor for an extension of the due date; and while in Arizona he, on two occasions, cliamed ownership of the car. Appellee submits that these facts, in the view most favorable to the Government, warranted sending the case to the jury for their determination of Vollick's intention when the car was transported in interstate commerce, and constitute substantial evidence in support of their verdict. *Bouchard v. United States,* 344 F.2d 872, 876 (9th Cir. 1965); *Cape v. United States,* 283 F.2d 430, 433 (9th Cir. 1960).

**2. The trial court appropriately instructed the jury that a defendant need not, in order to**

**"steal," intend permanently to deprice an owner of his vehicle, but, rather, that it is sufficient if the defendant did not intend to return the automoble, but instead intended to use it for his own purposes so long as it served his convenience and thereafter to dispose of it or abandon it.**

The instruction which the court gave on "stealing" under the Dyer Act was substantively correct. *United States v. Turley,* supra; *United States v. Dillinger,* supra. In light of the evidence discussed above, Appellee submits that the instruction clearly was appropriate.

In any event, no objection to the instruction was made before the jury retired, and since it was not plain error Rule 30, F.R.Crim.P., precludes assignment of it as error. *Goldsby v. United States,* 160 U.S. 70, 77 (1895); *Lewis v. United States,* 373 F.2d 576, 579 (9th Cir. 1967); *Holm v. United States,* 325 F.2d 44 (9th Cir. 1963).

## VI.

## CONCLUSION

It is respectfully submitted that the conviction should be affirmed.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of the within Brief of Appellee mailed this 5th day of January, 1968, to:

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